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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972
No. 71-1623

BOB BULLOCK, *etc.*,

Appellant

v.

DAN WEISER, *et al.*,

Appellees

On Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

APPELLEES' BRIEF ON THE MERITS

QUESTIONS PRESENTED

1. Whether the definition of the term 'as nearly equal as is practicable' contained in *Kirkpatrick* v. *Preisler* is substantively erroneous.

2. Whether the deviations from absolute equality contained in S.B.1 resulted despite a good faith effort, or are otherwise legally justified.

3. Was the remedy afforded by the trial court — the conditional imposition of Plan C — warranted under the record?

SUMMARY OF ARGUMENT

Wesberry v. *Sanders*, 376 U.S. 1 (1964) held that Article I, §2 of the Constitution requires that congressional districts be as nearly equal as is practicable.

Reynolds v. *Sims*, 377 U.S. 533 (1964) held that the Equal Protection Clause of the 14th Amendment requires that a state make a good faith effort to achieve equality in its own legislative apportionment.

Recognizing that no arbitrary point, above which deivations from equality can be said to be so trivial as to not give rise to a Constitutional right, can exist; and further recognizing that to sanction arbitrary approximations of equality is to encourage them, this Court held in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) that "as nearly equal as practicable" requires the state to make a good faith effort to achieve absolute equality in congressional districting.

The holding of *Kirkpatrick* does not preclude deviations which result despite a good faith effort, nor those which result from the systematic, non-arbitrary application of a rational state policy, e.g. allowances for growth or decline of population.

Appellees argue that the deviations in S.B.1 did not result despite a good faith effort to achieve absolute equality, in that no good faith effort was made.

The very architects of the bill severally testified that they thought that so long as the deviations were from four percent to ten percent, the constitutional mandate was satisfied.

It was generally agreed that the congressional redistricting bill would be written in a conference committee. This fact seriously limited participation in its construction and caused it to be the will of only a few legislative leaders.

The House of Representatives twice passed a bill having a maximum deviation of slightly more than half the deviation of the bill finally enacted. This bill was rejected solely for reasons of partisan politics.

Preservation of incumbents, partisan politics in filling a "vacant" seat, and preservation of county lines (at least in rural areas) were the primary considerations in the enactment of S.B.1.

Considered in the context of the willingness of the legislature to accept deviations ranging up to ten percent, and considering the predominant motivations behind in the bill, Appellees submit that S.B.1 was not the product of a good faith effort to achieve absolute equality.

Justification is not shown. While an effort was made, apparently, to preserve county lines in rural areas, county lines were freely cut when necessary to flesh out a predominantly rural district with urban population. Consideration of population trends, if any, was not done on a systematic, statewide basis. The finding of the trial court that no justification is shown should not be disturbed.

By way of remedy, the trial court conditionally adopted for implementation a plan of congressional districting having a maximum deviation of .28 percent as opposed to the maximum deviation of 4.1 percent

in S.B.1. The court had several plans before it, and was aware of the history of disenfranchisement in the State of Texas. Under these circumstances, the conditional adoption of a plan was appropriate. As at all times heretofore, the legislature is free to adopt any other plan consistent with the constitutional mandate.

ARGUMENT

I

WHERE A STATE IS ENTITLED TO MORE THAN ONE CONGRESSIONAL REPRESENTATIVE, ARTICLE I §2 OF THE CONSTITUTION REQUIRES THAT SUCH STATE MAKE A GOOD FAITH EFFORT TO THE END THAT EACH REPRESENTATIVE SHALL BE ELECTED BY EQUAL NUMBERS OF PERSONS. NEITHER THIS COURT IN *KIRKPATRICK* v. *PREISLER*, NOR THE TRIAL COURT IN THE CASE AT BAR HAS ADOPTED OR APPLIED ANY DIFFERENT STANDARD.

Appellant, under his first point, asserts that "[T]he case of *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969) . . . laid down a standard of strictest arithmetic equality . . . attributing to small variations a decisive constitutional significance". (Appellant's Brief, p. 7-8). Upon the assumption that this reading of *Kirkpatrick* is correct, Appellant then argues that there is no basis in law or in fact for such a rule and therefore ". . . *Kirkpatrick* ought at this time to be receded from by a short distance". (Id., p. 11).

Appellees respectfully believe that reading *Kirkpatrick* as being a radical departure from, or unwarranted

extention of well-settled, well-reasoned principles of constitutional law is erroneous. Appellees will also show that the record in this case amply supports the application of *Kirkpatrick* to the case at bar.

It is the Appellant's position that from all the relevant information (the wording of the Constitution itself, the reports of the debates prior to adoption, and the documents and speeches of the authors in support of ratification) the Constitution cannot require mathematical exactitude. Appellant then says that since *Kirkpatrick* struck down relatively minor deviations from mathematical exactitude, it must be wrong. This argument erroneously focuses on the numbers involved — the end result of the legislative effort, to the exclusion of the effort itself.

The emphasis in *Kirkpatrick*, as in the case at bar, was on the legislative effort — not the end result alone. This is the approach and emphasis in all cases of congressional districting and legislative apportionment (this being one of the common bonds between the two types of cases).

Significantly, *Kirkpatrick* relies on only two cases: *Wesberry* v. *Sanders*, 376 U.S. 1 (1964) and *Reynolds* v. *Sims*, 377 U.S. 533, (1964).

The primary question in *Wesberry* was whether the legislative action of congressional districting gave rise to a right protected by the Constitution and was therefore subject to judicial scrutiny. After deciding this question in the affirmative, the Court, on the merits, held that:

"... construed in its historical context, the command of Art. I, §2, that Representatives be

chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (376 U.S., 8-9).

No further definition of the term "as nearly as is practicable" is given, except in the concluding paragraph of the Court's opinion wherein it is stated:

"While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. This is the high standard of justice and common sense which the Founders set for us." (376 U.S., 18).

The next major case considered by the Court was *Reynolds* v. *Sims*, supra. While it involves reapportionment of a state legislature under the Equal Protection Clause of the 14th Amendment, it derives its holding from *Wesberry*, and goes a long way toward defining "as nearly as is practicable". The definition of the term in *Wesberry* was one of exclusion — stating what it was not. The definition in *Reynolds* is partially exclusionary, but goes further:

"By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State *make an honest and good faith effort* to construct districts . . . as nearly equal of population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical

exactness or precision is hardly a workable constitutional requirement." (377 U.S., 577) (emphasis supplied).

Thus evolves the holding of *Kirkpatrick* that:

"... the command of Art. I, §2, that states create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown". (394 U.S., 531).

See also *Wells* v. *Rockefeller*, 394 U.S. 542 (1969).

The historical references in *Wesberry* constitute a sound basis for defining "as nearly as is practicable" in the Equal Protection Clause terms of "good faith effort".

The 14th Amendment of course only operates on the States, as a limitation on their powers.

After tracing the evolution of the "Great Compromise", the Court states:

"William Samuel Johnson of Connecticut has summed it up well: 'in *one* branch the *people* ought to be represented, in the *other*, the *states*." (376 U.S., 13) (emphasis in original text).

Bearing in mind the polarity of strongly held convictions which led to the Great Compromise, it cannot be doubted that the Framers intended any less of a cleavage than that articulated by William Samuel Johnson, quoted above.

Further, considering that until the ratification of the 17th Amendment in 1913, senators were elected by the

state legislatures, there can be no doubt that the Framers did not intend that the legislatures of the several states should be able to control who was to represent the people of those states in the House of Representatives.

Thus it is appropriate that the limitations on the powers of the state in the 14th Amendment should, by analogy, operate as a limitation on the power of the state to interfere with the rights of the individual under Article I, §2.

Also, it would be anomalous to say that the state legislature must make a good faith effort to achieve equality in apportioning itself; but need not do so in apportioning the state's congressional seats among its populace. As stated in *Wesberry*:

> "It would defeat the principle solemnly embodied in the Great Compromise — equal representation in the House for equal numbers of people — for us to hold that, within the states, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, *and on a basis of complete equality for each voter.*" (376 U.S., 14) (emphasis supplied).

A. The record in this case amply supports the conclusion of the court below that no "good faith" effort to achieve equality was made.

The thrust of Appelles' argument is that the Constitution, as interpreted in *Wesberry* v. *Sanders*, *Reynolds* v. *Sims*, *Kirkpatrick* v. *Preisler*, and *Wells* v.

Rockefeller, requires that the legislature make a good faith effort to achieve absolute equality — not that absolute equality be achieved.

It is Appellees' position, as it has been throughout this litigation, that no such good faith effort was made by the Texas legislature; and that S.B.1 was not the product of such an effort. As in *Kirkpatrick*, ". . . it is simply inconceivable that population disparities of the magnitude found (in S.B.1) were unavoidable." (394 U.S., 532).

Appellees made the following statement in their *Motion to Dismiss or Affirm* (at page 9):

> "The debasement of the vote is of secondary importance. It is the calculated, forseeable consequence of '. . . the approach to redistricting' which, under all the evidence was (1) to protect incumbents . . . , (2) to choose who among them would be elected to fill a vacancy; and (3) to preserve geo-political lines."

Appellant, in his response to that pleading, suggests that this statement "foreshadows an entirely new theory — one that cries out for examination in this Court."

It is not Appellees' intention to assert any "new theory." Debasement of the vote is still the premise upon which Appellees' suit depends. Perhaps what Appellees should have said was

> "The debasement of the vote <u>was</u> of secondary importance <u>to the legislature</u>."

The point which Appellees were, and are trying to make is that the legislature did not set out solely to

make the votes of one group of persons more valuable than others as an end in and of itself — the desired ends (preservation of incumbents, creation of "safe seats", and preservation of geo-political lines) were of much more immediate and practical consequence.

The unjustifiable weighting of votes may have been the desired end in *Wesberry* and *Reynolds,* but as the Court states in the latter case:

> "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination." (377 U.S., 563).

In the case at bar, the Court is confronted with a more sophisticated as opposed to "simple-minded" discrimination. But, as the record amply demonstrates, it is discrimination none the less.

As will hereinafter be shown, the preoccupation of the legislature with factors other than equality of population amongst the districts is such as to preclude any serious contention that the deviations in S.B.1 resulted despite a good faith effort to achieve equality, or are otherwise justified.

1. *The record shows that the dominant theme of S.B.1 was to protect incumbent congressmen.*

This case squarely presents to the Court the question: to what extent, if any, may the legislature consider the protection of incumbents in establishing congressional districts?

Appellant asserts that this case may be distinguished from *Kirkpatrick* in that the latter ". . . was a case wherein there had been found bad faith in the

most classic sense — the sense, namely, of conscious and stubborn intent to perpetuate the very wrong the apportionment cases had struggled against." (Appellant's Brief, p. 79).

The concept of equal representatives for equal numbers of persons articulated in *Wesberry* derives from the Convention debates which resulted in the Great Compromise.

> "The history of the Constitution, particularly that part of it relating to the adoption of Art. I, §2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives." (376 U.S., 8-9).

See also the quotation from the speech of William Samuel Johnson, set forth at page 7, ante.

It is thus submitted that insofar as the legislature of the State of Texas has arrogated unto itself the right to determine who shall represent the people of the State of Texas in the House of Representatives, to the deliberate detriment of equal representation for equal numbers of persons, it has, at this late date, flatly repudiated the Great Compromise and has thereby manifested bad faith "in the classic sense."

Examination of the record in this case leads inescapably to the conclusion that S.B.1 was the product of a pervasive desire to protect incumbents and prevent their having to run against one another.

Respectfully, the Court's attention is directed to the following testimony:

Speaker of the House Mutscher, A. 80-81; 83-84;

Lt. Governor Barnes, A. 96-99; 106-108;

Sen. Word (Chairman of the Senate Committee) A. 169-170; 176-177;

Rep. Jones (Chairman of the House Committee) A. 227-238;

Sen. Mauzy (A committee member) A. 270-283;

Rep. Holmes (A committee member) A. 150-155.

According to the consensus of the testimony, by tradition congressional redistricting bills are written in conference committee. The work of the respective houses is merely a staking out of positions with a view toward a compromise in the conference committee. As stated by Senator Mauzy:

> "... the purpose of that is so that the Lieutenant Governor can work his will as to the Senate conferees and the Speaker can work his will as to the House conferees. That's common knowledge among members of the legislature." (A. 276).

In the case at bar this clash of wills prevented the passage of any bill by both houses and necessitated a special session of the legislature. The principal contentions which necessitated this situation were the dispute over who should "have" the second district in East Texas (a "vacant seat") and how the lines of the new twenty-fourth district should be drawn. (A. 276-277).

With regard to the latter point, Senator Mauzy testified:

> "... the committee was to draw the lines in the Fifth Congressional District in a way that Con-

gressman Cabell wanted them. They were to draw the lines in Tarrant County the way Congressman Wright wanted them drawn. They were to draw the lines for the Third Congressional District the way Congressman Collins wanted them drawn. They were then to give Congressman Teague in the Sixth District whatever population was necessary on the south ends of Dallas and Tarrant Counties to flesh out his district. And what was left was to be the Twenty-fourth District." (A. 277).

All the witnesses admitted that the committees of the two houses made two trips to Washington during the regular session to obtain the views of the incumbent congressmen. How these views impacted on the final bill is clearly shown in the testimony of Senator Mauzy. (See, please A. 278-282), particularly at A. 282. The story which is unfolded in these pages is, in the estimation of Appellees, chilling.

The dynamics of how the shape of a district affects one's chances of election is also set forth in Senator Mauzy's testimony appearing at A. 272-273.

S.B.1 pitted only two incumbents — Congressman Purcell (a Democrat) against Congressman Price (a Republican — one of three from Texas serving in the 92nd Congress). It is a legitimate deduction from the evidence that the heavily Democratic legislature, when confronted with the inevitability of at least one incumbent-versus-incumbent race, chose to subject at least one Republican to that inconvenience. Both of these gentlemen ran in the 13th District, and Congressman Price was re-elected.

Another interesting irony is the situation of Congressman Cabell (Democrat), who for years ran vir-

tually without Republican opposition in the 5th District, comprised in the major part of the east portion of Dallas County. It is apparent from the testimony of Representative Holmes (A. 150-154) and that of Senator Mauzy (A. 277, 279-280) that Congressman Cabell exercised some efforts to remove ten predominantly black Dallas precincts from his district. Historically, these precincts voted for Congressman Cabell's more liberal opponents in the Democratic primary; but Congressman Cabell usually carried them against his Republican opponent, if any, in the general election. What the framers of S.B.1 did not forsee was that Congressman Cabell would be opposed by an unusually strong Republican challenger in the recent general election — with the result that Congressman Cabell was in fact defeated.

These illustrations are not made for the purpose of interesting this Court in the minutae of Texas politics. Their sole purpose is to demonstrate that the "shaping" of districts, as in the case at bar, has a profound, if not determinative effect on who shall represent those districts.

While the case law is not definitive, it does support Appellees' contentions.

This Court held, in *Kirkpatrick* that:

> "Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster." (394 U.S., 533).

The notion that the "incumbency factor" has a legitimate place in the reapportionment equation was squarely rejected in *Klahr* v. *Williams*, 313 F.Supp.

148 (U.S.D.C., Ariz., 1970) and in *Bussie* v. *Governor of Louisiana*, 333 F.Supp. 452 (U.S.D.C., E.D. La., 1971). The former case was before this Court, *sub nom. Ely* v. *Klahr*, 403 U.S., 108 (1971); and the latter, *sub nom. Taylor* v. *McKeithen*, 92 S.Ct. 1980 (1972); but this Court has not had occasion to articulate a definitive opinion. However, the views expressed by the respective district courts are, Appellees submit, correct ones and should be adopted where the issue is squarely presented, as in this case.

2. A theme of equal importance was the concern over who would fill new or "vacant" seats.

There can be no doubt that the final form of S.B.1 was delayed by, and is the product of the contest between the Senate and House of Representatives as to whether Senator Wilson or Representative Haynes would run for the Congress representing the Second district. See, please, the testimony of Senator Mauzy (A. 279-271; 288-292); Speaker Mutscher (A. 86-87); Representative Jones (A. 262-264); Senator Word (A. 185-186).

The record reveals, without contradiction that the House of Representatives twice passed and sent to the Senate a bill with a maximum deviation "top-to-bottom" of 2.5%. This bill was twice rejected by the Senate. According to Senator Word (A. 185) it was because of the unaesthetic appearance of the Second District, which was roughly in the shape of a backward "C". (The plan was labeled by the press as the "backward 'C' plan"; and has subsequently been referred to as such throughout this litigation). The district acquired this singular shape in order to

remove Senator Wilson's home county from the district, and at the same time embrace in the district the home county of Representative Haynes.

A perhaps more accurate version of the senate rejection of the "backward 'C' plan" is gleaned from the testimony of Senator Mauzy (A. 290, 292).

Close examination of the map depicting the final bill (S.B.1) lends strong credence to this analysis. The examination of such map (which appears at page 44B of Appellant's Jurisdictional Statement) clearly discloses that in eliminating the "backward C" shape of the Second District, the conference committee did no more than shift it to the First District.

Whatever may be said in defense of protecting incumbents, surely it has not the slightest application to this situation. Nothing could be more repugnant to the spirit of the Great Compromise, or to the letter of Article I, §2, of the Constitution which is its product, than the spectacle of two houses of the legislature intractably deadlocked over which of their number shall be chosen to fill a "vacant" seat.

The quotation from Kirkpatrick (394 U.S., 533) rejecting the place of partisan politics in apportionment is singularly appropriate here also.

3. *A bill with far closer equality was twice passed by the lower House and rejected as politically unacceptable by the Senate.*

The facts with respect to this sub-point are set out in detail under the preceding sub-point. In sum, they show that the redistricting committee of the House during the regular session reported out a congressional

redistricting plan (H.R. 782) having a "top-to-bottom" disparity of 2.5%. The Senate-House conferees could not agree on a compromise.

During the special session, the House committee reported this same bill out; and once again, it was passed by the House and sent to the Senate, where it was rejected. S.B.1, containing a magnitude of disparity almost twice as great, was finally agreed upon by the conference committee. The only credible reason in this record for this rejection of H.R. 782 was that it preferred Representative Haynes over Senator Wilson in the Second District.

Appellant seeks to distinguish the case at bar from *Kirkpatrick* on this point by saying that the lesser deviation House plan was not rejected "without consideration". (Appellant's Brief, p. 80). The opinion of this Court in *Kirkpatrick* makes two references to the rejection of the lower deviation plan, the first at 394 U.S., 529; and the second at 394 U.S., 532. Only the latter reference employs the term "without consideration". The opinion of the district court more fully discusses the quantum of consideration given the lower deviation plan by the Missouri legislature. See *Preisler* v. *Secretary of State of Missouri*, 279 F.Supp. 952, 965-966.

Viewed in this context, it may be submitted that the statement "without consideration" was more of a commentary on the efforts of the Missouri legislature, than a statement of fact. In any event, the consideration given by the Texas Senate to H.R. 782 was certainly no greater than the consideration given by

the Missouri legislature to its lesser deviation plan, as disclosed by the opinion of the district court.

Unless the position of Appellees under the preceding subpoint is wholly wanting in merit, the adoption of a plan having almost double the population disparity of the plan rejected, under the facts of this case, negates any possible argument that S.B.1 is the product of a good faith effort to achieve absolute equality.

4. It was generally understood that de minimus *variations were acceptable. This factor caused the legislature to place undue emphasis on the above factors, to the detriment of equality of representation.*

Representative Jones testified (A. 250-254) that to the best of his knowledge a "top-to-bottom" deviation of ten per cent was acceptable; Representative Holmes, four per cent (A. 143); and Speaker Mutscher, six per cent (A. 82-83). Senator Mauzy testified that the majority of the Senate committee felt that five per cent would be acceptable. (A. 275).

In *Kirkpatrick*, this Court stated:

> "The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards . . . " (394 U.S., 530);

and

> "We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimus*. Moreover, to consider a certain range of variances *de minimus would encourage legislators to strive for that range rather than for equality as nearly as practicable.* (394 U.S., 531) (Emphasis supplied).

The mischief which this Court foresaw in *Kirkpatrick* was demonstrably present in the case at bar. Senator Mauzy testified:

> Q. [By Mr. Fischman]: " . . . Then their basic approach then [sic], was to take care of the Congressmen and then we'll see if it fits the numbers?"
>
> A. [Senator Mauzy]: "To take care of the Congressmen and to make it fit the numbers within five per cent, I think would be a more accurate way to put it." (A. 277-278).

Speaker Mutscher also put it accurately:

> Q. [By Mr. Fischman]: "And is it your testimony here today, Sir, that those deviations could not possibly have been avoided?"
>
> A. [Speaker Mutscher]: "The — the — the approach to redistricting determines as to what can be avoided." (A. 87).

Had the Texas legislature felt itself bound to strive for equality, conceivably its "approach to redistricting" would have been entirely different; and, it is submitted, this case would never have arisen.

B. No legal justification for the demonstrably avoidable deviations is shown under this record.

1. Preservation of county lines, even if an acceptable justification is not supported by the record in that such lines were cut in many instances, particularly when it was necessary to 'flesh out' a predominantly rural district with urban population.

The preservation of county lines as a justification for deviations from equality has been rejected by this

Court. Such rejection with respect to congressional redistricting cases is strongly implicit in *Reynolds* v. *Sims*, 377 U.S., 577-578; and is explicit in *Kirkpatrick*, 394 U.S., 533-534; and *Wells* v. *Rockefeller*, 394 U.S., 546.

Whatever merit the preservation of geo-political lines may have, arguments in its favor are inapposite in the case at bar.

Firstly, there is no clearly demonstrable instance where the deviation in a particular district under S.B.1 can be attributed, under the record, to preservation of county lines.

Secondly, but perhaps more importantly, county lines were cut when it was expedient to do so. Such lines were cut whenever it was necessary to flesh out a rural district with urban population. Referring to the map depicting S.B.1 at page 44B of Appellant's Jurisdictional Statement, the following instances are discernable:

(1) the division of Ector County placing the City of Odessa (population 60,000) and part of the surrounding Ector County in the Sixteenth District, and the remainder of the County in the Nineteenth District;

(2) the division of Bexar County (San Antonio) into a central city core district (Twentieth), with the remainder of the County, including the suburban communities, allocated between the Twenty-first and Twenty-third Districts;

(3) the inclusion of the southwest portion of Harris County (embracing parts of Houston and its suburbs) in the Twenty-second District; and

(4) the filling out of the Sixth District with the southeast portion of Tarrant County (Ft. Worth) and southwest Dallas Country (Dallas).

But for the arguable exception of Ector County, all cutting of county lines in S.B.1 involves the highly urbanized counties. Instances (2) and (4), it may be argued, resulted from the predominant desire to protect incumbents and to favor rural over urban interests. It would thus appear that if preservation of county lines was a factor considered by the legislature, it was a factor of the lowest priority; and on the whole, cannot stand as justification for the deviations in S.B.1.

2. *Allowances for population trends were not made on a rational, systematic basis.*

This Court established in *Kirkpatrick* that so long as it is not employed as a subterfuge to evade or impinge upon the concept of equal representation for equal numbers of persons, the science of demographics has a legitimate place in the legislative function of districting.

The safeguard which assures that demographics will not be used as a subterfuge is the requirement that the demographic data be applied in a systematic, nondiscriminatory manner, on a state-wide basis. It is this requirement that must render untenable Appellant's contention (at page 71 of his brief) that such justification is a function of the ingenuity of counsel defending the legislation in a lawsuit after the fact.

Absent the advantages of hindsight, the record does not support any credible claim of justification based on allowances for population trends. See, e.g. the testimony of Representative Jones at A. 250; House

committee clerk Teague at A. 130-133; and Senate committee clerk Hooser at A. 115-117. In oral argument upon trial of the case, Appellant in fact conceded that justification was no more than a secondary argument.

Finally, it may also be suggested that whatever merit there may be to Appellant's criticism of the decennial census, its deficiencies may be adequately remedied by a systematic, non-discriminatory application of demographic data.

II

THE COURT BELOW ACTED PROPERLY IN ADOPTING FOR IMPLEMENTATION PLAN C PRESENTED BY APPELLEES.

As stated to the court below and to this Court in Appellees' opposition to Appellant's Application for Stay of Mandate, "the State of Texas has a full and rich history of malapportionment". In the past decade its Congressional apportionment has been declared unconstitutional (1966); its State House and Senate districting has been declared unconstitutional (1964 and again in 1967); after thirty years of non-reapportionment its State Board of Education districting was declared unconstitutional (1969); and its apportionment of County Commissioner Courts was declared unconstitutional (1968). In addition, its provisions for filing fees in primary elections [have] been declared unconstitutional for the second time within two years.

The Supreme Court of Texas declared the 1971 reapportionment of the State House to be unconstitutional and the subsequent reapportionment of that body and the State Senate was subsequently declared unconstitutional by a United States three

judge district court whose action Appellees understand was not "stayed" by this Court.

This "reapportionment history in the State lends some substance to [the] fears" of Appellees that the failure to adopt a constitutional plan by the court below would mean a continuous program of litigation and deferral evidenced so well by the history of seven years of litigation set forth in *Ely* v. *Klahr*, 403 U.S. 115 (1971) from which the above quote was taken. Unlike *Ely*, however, your instant Appellees did present alternative plans for reapportionment so that the court could avoid adding to Texas' rich history of elections conducted under malapportioned schemes. The court's power to reapportion when the legislative apportionment falls short of constitutional requirements is not in question and has been well settled. *Reynolds* v. *Sims*, supra; *Swann* v. *Charlotte — Mecklenburg Board of Education* 402 U.S. 1 (1972).

Appellants' now recede by a short distance from their position of accusing the court below of political motivation in adopting or becoming a tool in the adoption of a plan which implemented their own "Republican" and "liberal Democrat" philosophies and party interests. See, Appellants' Application for Stay of Mandate at page 9. Instead, this Court is urged to find that that court "fell far below" the standard of giving full and adequate deliberation and consideration to this important decision. Appellants' Brief at page 86.

Appellees' do not presume to know what occurred in chambers prior to or after hearing argument in this matter. The facts, however, give full credence to the

possibility of deliberate and concerned consideration of the selection of a constitutional plan and Appellees would presume no less from the court below, no matter what the political persuasions of the judges comprising the court (if such were determinable). Indeed, if the court below had drawn its own plan, it is interesting to speculate what misfeasance the Court would have been accused of if the States' officials were not satisfied with the court's solution.

The court below was informed at the pre-trial held on December 7, 1971 that "Plan C" was to be formulated and presented to the court and that it would be developed at the outset by the use of population equality as the primary standard coupled with the need to keep the districts as compact and contiguous as possible. On January 10, 1972 that Plan was filed and the court was informed that Plan C embodied compactness and contiguity while keeping the population disparity (high to low districts) to .28 per cent. The court was also supplied with maps having overlays depicting the various plans so that they could compare the compactness of each plan with the others. Additionally, the court had been provided with population figures for the various areas so they could readily determine the compactness and contiguousness of the districts in conjunction with their population densities to readily determine which of the plans best suited the constitutional mandate of "one man, one vote". Indeed, this Court could make the same decisions with the maps presented at pages 44B, 46B and 48B of Appellants' Jurisdictional Statement if the Court had population figures to apply.

Plan B, presented by Appellees, merely took the plan of the legislature and adjusted that plan to achieve greater equality to present to the court, in a graphic manner, what the legislature could have done if it had been disposed to make an attempt at population equality in spite of the lack of good faith evidenced in the ways in which the legislature developed its plan as set forth above. The court below in formulating or adopting a plan had before it various exhibits and evidence setting forth the deficiencies in the design of S.B.1 and inherent in Plan B.

Appellees amended complaint requested the adoption of Plan C in its prayer for relief among the alternatives requested. Appellant would now imply that Plan C was not seriously considered by Appellees inasmuch as they did not argue for its adoption during the 45 minutes permitted for argument. Appellees had Plan C before the court and presumed that it had been and would be considered and discussed. It is worthy of noting that the court after having had the opportunity to consider and compare the various plans stated in their opinion "Plan C is based solely on population and is *significantly* more compact and contiguous than either S.B.1 or Plan B." Appellants Jurisdictional Statement of page 27A. (Emphasis Added).

In light of the State of Texas' rich history of malapportionment and the courts expressed concern over the length of time which would be spent in litigation of this matter the court had no alternative but to adopt a new apportionment plan once a decision as to the unconstitutionality of the legislative enactment had been decided. The court below very carefully left the

option open for the State to reconvene its legislature for the purpose of enacting a constitutional redistricting plan at a time when the calling of a special session of the legislature was being considered by the Governor of the State for other purposes. Thus, the court gave due deference to the legislature's wishes by permitting the legislature to replace the court's plan with its own constitutional plan whenever enacted. Subsequently, the Governor of the State refused to call a session of the legislature for the purpose of enacting a constitutional redistricting plan. The current legislature, now in session for a short time, has not yet seen the introduction of any bills concerning redistricting. If the determination of the court below that S.B.1 is unconstitutional is to stand, the action of that court in conditionally imposing a plan becomes ever more appropriate in light of the continued inaction of the legislature.

Once the decision to implement a new plan was made, Plan C was the only choice for the court due to their decision that Plan C "best effectuates the principal of 'one man, one vote' enunciated by the Supreme Court." Opinion of the court below at Appellant's Jurisdictional Statement 27A.

CONCLUSION

WHEREFORE, Appellees pray that the judgment of

the trial court be in all things affirmed and that Appellees recover their costs in this behalf expended.

Respectfully submitted,

Lawrence Fischman
David H. Rosenberg
601 Kirby Building
Dallas, Texas

FILE COPY

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MICHAEL RODAK, JR., CL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-1623

BOB BULLOCK, et al,

Appellants

v.

DAN WEISER, et al,

Appellees

On Appeal from the United States District Court for the Northern District of Texas Dallas Division

---

APPELLEE-INTERVENORS' BRIEF ON THE MERITS

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January, 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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BOB BULLOCK, et al,

Appellants

v.

DAN WEISER, et al,

Appellees

On Appeal from the United States District Court for the Northern District of Texas Dallas Division

---

APPELLEE-INTERVENORS' BRIEF ON THE MERITS

OPINION BELOW

The opinion and orders of the District Court for the Northern District of Texas are not yet reported. The opinion and orders are attached to Appellee-Intervenors' Brief herein as Exhibit A. The order of this Court staying the said judgment, on application by Appellant to Mr. Justice Powell, by him referred to the Court, is reported at 404 U.S. 1065, 92 S. Ct. 750 (January 27, 1972). This Court's denial of the motions of Appellees to advance and expedite and to dis-

pense with printing is reported at 405 U.S. 912, 92 S. Ct. 928 (February 22, 1972).

JURISDICTION

The Appellant has correctly stated the law applicable to this Court's having found jurisdiction of this case and Appellee-Intervenors will here omit restatement relative thereto as provided by S.Ct. Rule 40. Appellee-Intervenors, Van Henry Archer, Jr., et al, filed Motion for Extension of Time to File Brief (Ex. B) and extension of time was granted (Ex. C), and that said Intervenors' brief was timely filed.

QUESTIONS PRESENTED

1. Appellee-Intervenors, Archer, et al, do not agree with Appellant as to the Questions Presented and here state that the proper Questions Presented to the Supreme Court are as follows:

2. Whether the Plaintiffs (Appellees herein), based upon the pleadings, depositions, briefs, exhibits, stipulations and arguments, presented sufficient evidence to the Court to warrant the Court holding that Plaintiffs proved their claims as set out that the congressional districts established by S.B. 1 are not as compact, contiguous and as nearly equal in population as is practicable; and, therefore, said statute violated on its face Article 1 §2 of the United States Constitution. Thus, Plaintiffs contend that they and others similarly situated are deprived of their constitutional rights to have their vote count for as much as every other voter (A 75-76).

3. Whether the legislature, by enacting S.B. 1, did not make a good faith effort to established districts which meet the requirements of Article 1 §2 of the United States Constitution that such districts be as

compact, contiguous and as nearly equal in population as is practicable (A 75-76).

4. Whether the Defendants (Appellants herein), based upon the pleadings, depositions, briefs, stipulations and arguments, presented sufficient evidence to the Court to warrant the Court denying Plaintiffs the relief they sought and warranting the Court holding that S.B. 1 was constitutional (A 75-76).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The Appellant has correctly stated statutes and constitutional provisions involved and the same will hereby be omitted as provided in S. Ct. Rule 40.

STATEMENT

Appellee-Intervenors, Archer, et al, adopt by reference the Appellee, Dan Weiser, et al, Brief on the Merits insofar as said Brief applies to said Appellee-Intervenors, F.R.A.P. Rule 28 (1) 8 U.S.C.A. Appellee-Intervenors here state to the Court that the first four paragraphs of the Statement contained in Appellants' Brief on the Merits are correct.

That Plan C. the plan adopted by the Court, allowed for a population deviation of less than 3/10ths of 1% (.0028) (A 59-64), while S.B. 1 allowed a population deviation of 4.13% (A 12-19). On January 22, 1972 the Court below, in a three page opinion and order, declared S.B. 1 unconstitutional, enjoined elections under it, and adopted Plaintiffs' Plan C as "the plan of this Court for the congressional districts for the State of Texas" (Exhibit A).

The District Court's decree provided for reconsideration if the legislature devised a new plan but the Governor refused to call a special session. That a new

legislature is now in session and that the trial court retained jurisdiction for the adoption of a new plan.

This Court granted a stay of this judgment on January 27, 1972 (see 92 S.Ct. 750). That the Appellant made no request for "findings of fact". That the depositions taken in the case suggest that a primary objective of the legislators was a concern with the protection of incumbent congressmen, together with the creation of districts that would be beneficial to those state senators interested in running for congress. There was also concern over who might be elected to congress to fill vacant seats or new seats created by S.B. 1. That there was no evidence presented by the Appellant to show that the population variances existing under S.B. 1 were unavoidable nor that a good faith effort was made to achieve absolute equality, nor was justification shown for any such variances.

The record in this case amply supports the conclusion of the Court below that no good faith effort to achieve mathematical equality was made, and further that there was no attempt by the Appellant to justify each variance.

SUMMARY OF ARGUMENT

That the case of Kirkpatrick vs. Preisler, 394 U.S. 526 (1969), the authority relied upon by the Court below in their opinion and order, requires mathematical equality and "permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown." (page 535).

The burden is upon the Appellant to prove justification for variances. It is noteworthy that a prior districting plan, H.B. 782, had been passed by the Texas

House of Representatives (A-288) and was defeated in the Senate. That plan had less population disparity than S.B. 1 (A-192).

Finally, it appears that the Appellant feels that the Kirkpatrick case goes too far, and is asking this Court to set aside the rule as adopted by the Kirkpatrick judgment because it does not suit Appellants' purposes and thinking. Appellant further states that the Court should have invited proposals for relief from Defendants and from the public. It is noteworthy that the State refused to submit an alternate plan but stood on S.B. 1. Defendants thereby waived their right to submit additional plans for the Court's consideration.

In summary, it appears the Appellant is dissatisfied with the judgment rendered in the Kirkpatrick case and is requesting this Court to reverse itself, or that this Court find a distinction between the present case and the Kirkpatrick case, or to determine whether or not the trial court acted improperly in adopting the plan they adopted. The fact still remains that the true criterion under the Kirkpatrick decision is that constitutional districts should be drawn, which provide equal representation for equal numbers of people permitting only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown. The Appellant has failed to show that a good faith effort was made to achieve absolute equality and has failed to justify any such variances.

Appellee-Intervenors submit that the trial court's ruling that S.B. 1 (A-12-19) was unconstitutional, and in the Court's judgment adopting Plan C as the proper plan for congressional redistricting, and the Court's instructions in connection therewith (Exhibit A),

were correct and said Judgment and Orders should be, by this Court, affirmed.

CONCLUSION

For the reasons given, the judgment of the Court below should be sustained.

Respectfully submitted,

NATHAN W. EASON

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400 Alamo National Building
San Antonio, Texas 78205

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAN WEISER, ET AL.

v.

HONORABLE BOB BULLOCK,
SECRETARY OF STATE OF THE
STATE OF TEXAS

CIVIL ACTION
No. CA-3-5202-D
(Three Judge Court)

OPINION AND ORDER

Before INGRAHAM, Circuit Judge, and TAYLOR and HILL, District Judges Per Curiam: Plaintiffs attack the constitutionality of the Texas statute establishing congressional districts for the State of Texas, S.B. 1, now codified as Art. 197d, V.A.C.S. (1971). Under the provisions of secs. 2 through 25 of S.B. 1, the population of the largest legislative district established is 19,275 persons greater than that of the smallest district, producing a deviation of 4.1 percent.

In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Supreme Court held that in congressional redistricting a State must "make a good-faith effort to achieve precise mathematical equality." 394 U.S. at 530. Population variances are not permissible unless the State shows either that they resulted despite such an effort or unless "the State (justifies) each variance, no matter how small." 394 U.S. at 531. The record in this case fails to show that in the enactment of S.B. 1 the Legislature of the State of Texas "came as close to equality as it might have come." 394 U.S. at 531. Nor has the State justified the variances in S.B. 1 within the principles laid down in *Kirkpatrick*. Therefore this

Court holds that S.B. 1 is unconstitutional. Accordingly, defendant is enjoined from conducting or permitting any primary or general elections based upon the districts established by S.B. 1.

Van Henry Archer, Jr., individually and as Chairman of the Bexar County Republican Party, and others, have applied to this Court for leave to intervene as plaintiffs. Leave to intervene is hereby granted to the extent stated by the attorney for intervenors in open court.

Defendant has not submitted any plan of reapportionment as an alternative to S.B. 1. Plaintiffs have proposed two plans, B and C. Plan B is based on S.B. 1, but has significantly lower deviation than S.B. 1. Plan C is based solely on population and is significantly more compact and contiguous than either S.B. 1 or Plan B. The population deviation in Plan C is less than 3/10 of one percent (.0028). The Court has considered Plans B and C, as well as the plan submitted by the intervening plaintiffs, and concludes that Plan C best effectuates the principle of "one-man, one vote" enunciated by the Supreme Court.

It is therefore ORDERED that Plan C, as set forth in detail in Exhibit A attached hereto and made a part hereof, be and it is hereby adopted as the plan of this Court for the congressional districts of the State of Texas and said plan is hereby declared to be in effect and operative immediately upon the signing of this Opinion and Order as establishing the Congressional Districts of the State of Texas.

This Order is entered without prejudice to the legislative and executive branches of the State of Texas to proceed with the consideration and adoption of any other constitutionally permissible plan of congressional

redistricting at a called or regular session of the Legislature of the State of Texas. This Court retains jurisdiction of this cause for the purposes of considering any such plan which might be adopted by the Legislature of the State of Texas until congressional reapportionment is enacted based on the Twentieth Decennial Census to be conducted in 1980.

The deadline in Texas for the filing by candidates for Congress of the United States is February 7, 1972. This Court also retains jurisdiction for the purpose of extending the filing deadline for candidates in congressional districts in the event it is made known to this Court that a called session of the Legislature will include congressional reapportionment.

Plaintiffs sue on behalf themselves and all other qualified voters, registered and unregistered, within the several districts wherein the respective plaintiffs reside as well as all other qualified voters in all other congressional districts in the State of Texas. The Order entered herein is determinative of the rights all others regarding congressional redistricting. Proceeding herein with this clause as a class action is not only unnecessary but creates problems with reference to notice and the rights of other individual members of the class. Maintenance of this cause as a class action is hereby denied.

Copies of this judgment and order will be forwarded to all attorneys of record, the Governor of the State of Texas, the Lieutenant Governor of the State of Texas, the Speaker of the House of Representatives of the State of Texas, the Secretary of State of the State of Texas, and the Attorney General of the State of Texas.

It is further ORDERED that this judgment be considered, for purposes of appeal and otherwise, as a

final judgment in this case, and that no stay of proceedings pending appeal will be granted by this Court.

Dated at Dallas, Texas this . . . . day of January, 1972.

United States Circuit Judge

United States District Judge

United States District Judge

DISTRICT 1 is composed of Bowie, Camp, Cass, Delta, Fannin, Franklin, Grayson, Harrison, Hopkins, Lamar, Marion, Morris, Rains, Red River, Rockwall, Titus, Upshur and Wood Counties; and all of Hunt County not included in the Celeste census county division.

DISTRICT 2 is composed of Angelina, Brazos, Grimes, Hardin, Houston, Jasper, Liberty, Madison, Montgomery, Newton, Orange, Polk, Robertson, Sabine, San Augustine, San Jacinto, Trinity, Tyler, and Walker Counties; and that part of Leon County included in the Centerville and Oakwood census county divisions.

DISTRICT 3 is composed of that part of the city of Richardson in the Plano census county division of Collin County, and that part of Dallas County included in census tracts 1, 2.01, 2.02, 3, 6.01, 6.02, 7.02, 9, 10, 11.01, 11.02, 12, 14, 71.01, 72, 73.01, 73.02, 74, 75.01, 75.02, 76.01, 76.02, 76.03, 76.04, 77, 78.01, 78.02, 78.03, 79.01, 79.02, 80, 81, 82, 94, 95, 96.01, 96.02, 96.03, 96.04, 97, 98, 99, 128, 129, 130.01, 130.02, 131, 132, 133, 134.01, 134.02, 135, 136.01, 136.02, 136.03, 137.01, 137.02, 137.03, 137.04, 137.05, 138.01, 138.02, 139, 140.01, 140.02, 141.01, 141.02, 141.03, 141.04, 142, 143, 144, 145, 146, 147, 185.02, 190.02, 190.03, 190.04, 191, 192.01, 192.02, 192.03, 192.04, 192.05, 192.06, 192.07, 193.01, 193.02, 194, 195.01, 195.02, 196, 197 and 198.

DISTRICT 4 is composed of Anderson, Cherokee, Freestone, Gregg, Henderson, Kaufman, Nacogdoches, Navarro, Panola, Rusk, Shelby, Smith and Van Zandt Counties; and that part of Leon County not included in District 2.

DISTRICT 5 is composed of that part of Dallas County not included in District 3 or 24.

DISTRICT 6 is composed of Hood and Johnson Counties; and that part of Tarrant County included in census tracts 13, 14.01, 14.03, 16, 19, 23.01, 23.02, 24.01, 24.02, 25, 26, 28, 29, 30, 31, 32, 33, 34, 36.01, 36.02, 37.01, 37.02, 38, 39, 40, 41, 42.01, 42.02, 43, 44, 45.01, 45.02, 45.03, 46.01, 46.02, 46.03, 46.04, 46.05, 47, 48.01, 48.02, 51, 52, 53, 54.01, 54.02, 55.01, 55.02, 55.03, 55.04, 56, 57.01, 57.02, 58, 59, 60.01, 60.02, 60.03, 61.01, 61.02, 62, 63, 64, 65.01, 65.02, 65.03, 65.04, 65.05, 108.01, 108.02, 108.03, 109, 110.01, 110.02, 111.01, 111.02, 112.01, 112.02, 113, 114, 115.01, 115.02, 115.03, 115.04, 130, 131, 216.01, 216.02, 216.03, 217.01, 217.02, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228 and 229.

DISTRICT 7 is composed of that part of Harris County included in census tracts 558, 557, 554, 553, 552, 556, 555, 551, 545, 550, 549, 548, 542, 546, 544, 537, 538, 541, 540, 452, 451, 543, 542, 529, 528, 527, 526, 519, 517, 443, 442, 441, 444, 447, 448, 450, 449, 446, 445, 440, 421, 406, 420, 422, 439, 438, 437, 436, 423, 419, 424, 435, 407, 409, 408, 411, 418, 417, 416, 425, 426, 434, 429, 428, 427, 433, 431, 432, 333, 413, 334, 536, and 430; and that part of census tract 405 included in census block group 5.

DISTRICT 8 is composed of that part of Harris County included in census tracts 559, 244, 245, 243, 242, 535, 241, 533, 240, 223, 531, 532, 222, 221, 224, 525, 524, 523, 522, 220, 218, 225, 217, 216, 215, 227, 521, 229, 228, 230, 214, 203, 209, 213, 231, 212, 202, 210, 211, 232, 233, 321, 320, 322, 350, 351, 352, 354, 234, 262, 261, 267, 268, 263, 265, 266, 270, 269, 271, 264, 361, 362, 273, 274, 272, 275, 364, 360, 363, 365,

530, 539, 534, 254 and 353.

DISTRICT 9 is composed of Chambers, Galveston and Jefferson Counties and that part of Harris County included in census tracts 250, 249, 247, 238, 251, 248, 246, 252, 253, 237, 236, 256, 255, 257, 258, 235, 259, 260, 226 and 239.

DISTRICT 10 is composed of Austin, Bastrop, Blanco, Caldwell, Fayette, Hays, Travis, and Washington Counties; that part of Guadalupe County included in the Seguin East, Seguin North, and Seguin Southwest census county divisions; that part of Lavaca County included in the Moulton and Shiner census county divisions; all of Waller County not included in the Brookshire census county division; all of Colorado County not included in the Garwood census county division; and all of Gonzales not included in the Nixon census county division.

DISTRICT 11 is composed of Bell, Bosque, Burleson, Burnett, Coryell, Falls, Hamilton, Lampasas, Lee, Limestone, McLennan, Milam, Mills, Somervell and Williamson Counties; that part of Brown County included in the Brookesmith census county division; and that part of San Saba County included in the San Saba North census county division.

DISTRICT 12 is composed of Cooke and Denton Counties; that part of Collin County not included in District 3, that part of Tarrant County not included in District 6, and that part of Hunt County not included in District 1.

DISTRICT 13 is composed of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Collingworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Foard, Gray, Hale, Hall, Hansford, Hardeman,

Hartley, Hemphill, Hutchinson, Kent, King, Lamb, Lipscomb, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Stonewall, Swisher and Wheeler Counties; that part of Knox County not included in District 17, that part of Haskell County not included in District 17, and that part of Hockley County not included in District 19.

DISTRICT 14 is composed of Aransas, Calhoun, Jackson, Matagorda, Nueces, Refugio, San Patricio, Victoria and Wharton Counties; that part of Colorado County not included in District 10; and that part of Lavaca County not included in District 10.

DISTRICT 15 is composed of Brooks, Cameron, Duval, Hidalgo, Jim Hogg, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Starr, Willacy, and Zapata Counties; that part of Bee County included in the Pettus-Pawnee census county division; and that part of Karnes County included in the Kenedy census county division.

DISTRICT 16 is composed of Brewster, Crane, Culberson, El Paso, Hudspeth, Jeff Davis, Loving, Pecos, Presidio, Reeves, Terrell, Val Verde, Ward, and Winkler Counties.

DISTRICT 17 is composed of Archer, Baylor, Callahan, Clay, Comanche, Eastland, Erath, Jack, Jones, Montague, Palo Pinto, Parker, Shackelford, Stephens, Taylor, Throckmorton, Wichita, Wilbarger, Wise and Young Counties; that part of Haskell County included in the Hasket and Weinert census county divisions, and that part of Knox County included in the Goree census county division.

DISTRICT 18 is composed of that part of Harris County not included in District 7 or 8 or 9 or 22.

DISTRICT 19 is composed of Andrews, Borden, Cochran, Dawson, Ector, Gaines, Garza, Howard, Lubbock, Lynn, Martin, Midland, Terry, Upton and Yoakum Counties; and that part of Hockley County included in the Ropesville census county division.

DISTRICT 20 is composed of that part of Bexar County included in census tracts 1106, 1107, 1203, 1204, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1218, 1219, 1601, 1604, 1605, 1606, 1607, 1614, 1615, 1616, 1617, 1618, 1619, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1801 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1901, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916 and 1917.

DISTRICT 21 is composed of Bandera, Coke, Coleman, Comal, Concho, Crockett, Dimmit, Edwards, Fisher, Frio, Gillespie, Glasscock, Irion, Kendall, Kerr, Kimble, Kinney, LaSalle, Llano, Mason, Maverick, McCulloch, Medina, Menard, Mitchell, Nolan, Reagan, Real, Runnels, Schleicher, Scurry, Sterling, Sutton, Tom Green, Uvalde, Webb and Zavala Counties; that part of Brown County not included in District 11, that part of San Saba County not included in District 11 and that part of Atascosa County not included in District 12.

DISTRICT 22 is composed of Brazoria and Fort Bend Counties; that part of Waller County not included in District 10; and that part of Harris County included in census tracts 412, 414, 415, 331, 332, 329, 366, 339, 340, 335, 338, 336, 337, 341, 343, 342, 319, 325, 326, 324, 410, 355, 356, 349, 357, 358, 348, 359, 347, 346, 345, 370, 367, 369, 368, 373, 374, 371, 372, 375, 327, 323 and 344.

DISTRICT 23 is composed of Dewitt, Goliad and Wilson Counties; that part of Bee County not included in District 15; that part of Karnes County not included in District 15; that part of Guadalupe County not included in District 10; that part of Atascosa County included in the Poteet census county division; that part of Gonzales County not included in District 10; and that part of Bexar County not included in District 20.

DISTRICT 24 is composed of Ellis and Hill Counties and that part of Dallas County included in census tracts 4.01, 4.02, 4.03, 5, 7.01, 20, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 56, 57, 59.01, 59.02, 60.01, 60.02, 61, 62, 63.01, 63.02, 64, 65, 67, 68, 69, 71.02, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111.01, 111.02, 112, 113, 148, 149, 150, 151, 152, 153.01, 153.02, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165.01, 165.02, 165.03, 165.04, 165.05, 166.01, 166.02, 166.03, 166.04, 167.01, 167.02, 168, 169.01, 169.02, 169.03, 169.04 and 199.

EXHIBIT B

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-147

BOB BULLOCK, ET AL

Appellants,

v.

DIANA REGESTER, ET AL

Appellees.

On Appeal From the United States District Court For the Western District of Texas

---

MOTION OF VAN HENRY ARCHER, JR., ET AL FOR EXTENSION OF TIME FOR FILING BRIEF

Comes now the Intervenors, Plaintiffs below, VAN HENRY ARCHER, JR., et al, and pursuant to the provisions of Rule 34, move for a thirty (30) day extension for the filing of their Brief in this cause for the following reasons:

1. This is a multi-faceted reapportionment case involving a number of parties and a multitude of contentions. The complexity of the case is evidenced by the opinion of the Court below which consists of sixty-three (63) printed pages in the Appendix to the Jurisdictional Statement.

2. The record in this case is voluminous, consisting of several thousand pages of testimony, depositions and hearings and well over one hundred exhibits. Inasmuch as the parties have deferred printing of the Appendix, the record is not readily accessible. Also, counsel has been further handicapped due to his illness and the illness of his stenographer which has made it impossible to secure the services of a knowledgeable stenographer familiar with preparation of appellate briefs to complete the transcription of said brief and have same printed and filed by December 30, 1972.

3. Because of the bulk of the record, the complexity of the issues and finally the intervention of the holiday season, and its inevitable interruption of routine, as well as the illness of counsel and staff, counsel cannot adequately prepare and file its brief within the allotted time.

In consideration of the foregoing, counsel respectfully requests an extension of thirty (30) days, until February 2, 1973, within which to prepare and file its brief, and in this connection represents to the Court that Appellants have indicated that they have no objection to the extension.

Respectfully submitted,

NATHAN W. EASON

J. DOUGLAS MCGUIRE
Counsel for Van Henry Archer, Jr., et al
400 Alamo National Building
San Antonio, Texas 78205

This is to certify that a true and correct copy of the foregoing Motion has been served by Certified Mail upon all counsel of record.

.....

J. Douglas McGuire

EXHIBIT C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 2, 1973

J. Douglas McGuire, Esq.
400 Alamo National Building
San Antonio, Texas 78205

Re: Bullock, et al. v. Regester, et al.
No. 72-147, and
Bullock v. Weiser, No. 71-1623

Dear Mr. McGuire:

Receipt is acknowledged of your letters of December 26, 1972, together with applications for an extension of time for filing the brief of appellees Van Henry Archer, Jr., et al., in the above-entitled cases for a period of 30 days. You are informed that on December 20, 1972, appellees were granted an extension of time to and including January 17, 1973. I am hereby extending your time to and including January 24, 1973. No further extension will be granted by this office since the cases will be argued before the Court during the two-week session in February.

Very truly yours,

Michael Rodak, Jr.
Clerk

FILE COPY

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-1628

BOB BULLOCK, etc.,

Appellant

v.

DAN WEISER, et al.,

Appellees

On Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

APPELLANT'S REPLY BRIEF

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February 1973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-1623

BOB BULLOCK, etc.,

Appellant

v.

DAN WEISER, et al.,

Appellees

On Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

APPELLANT'S REPLY BRIEF

INTRODUCTORY

Appellees' Brief does not seem to confront the arguments supporting appellant's contention-in-chief (Appellant's Brief, Point I); appellant simply stands by these, without more. It is believed that economy of time on oral argument can be effected by short reply to a few specific points as to other matter in Appellees' Brief. Point numeration here will follow that of their Brief.

I-A-1 (pp. 10 ff.)

There has never been doubt of the Legislature's in-

tention to avoid pairing incumbent Congressmen where possible. Appellant, if called on to do so, would defend this intent as entirely proper — especially where, as here, party and ideological bias are affirmatively and uncontradictedly shown not to have existed. (See Appellant's Brief, p. 72; as to this point, moreover, it is more than ironical that the two incumbents defeated in 1972 under this Democratic Legislature's plan were Democrats, Appellees' Brief, pp. 13-14). But this defense is unnecessary, for there is no showing (and no concrete or distinct claim) of any causal connection between this intent (or any other intent concerning "protection of incumbency") with any of the small population variances which are now returned to as "the premise upon which appellees' suit depends" (Appellees' Brief, p. 9). Appellees' Plan B, as appellees have admitted or even proclaimed (see Appellant's Brief on the Merits, p. 73) attains practically the same incumbency-related ends as S.B.1, except that county lines are freely cut, and population variance is thereby reduced virtually to zero. Even if the Legislative motive, under its most pejorative name (that of "incumbency protection") were bad, mere bad motivation, from which no constitutionally forbidden consequences are shown causally to flow, cannot ground a constitutional claim. It still remains a puzzle how appellees, having put forward and strongly advocated their Plan B, can now assail the constituency-representative effect which that Plan, like S.B.1, by their own account embodied.

(It is regrettable that appellees have introduced (Appellees' Brief, p. 14) what surely is not intended by them, but might be taken, as a suggestion of an instance of racial bias in S.B.1, in connection with the placing of ten black Oak Cliff precincts (with the rest

of Oak Cliff) in the 24th District, instead of the 5th. This subject having been raised, appellant has no alternative to making the following points:

(1) Reverend Holmes' opinion, tendered only as such (A. 152), that this placement significantly diluted Black strength seems quite improbable, in view of the fact that the 24th as constituted now contains some 90,000 "Negroes" (the census term) while the 5th contains some 80,000. (U.S. Bureau of the Census, *Congressional District Data, Texas*, April 1972, pp. 8, 10) No firmer data on this are in the Record, or known to appellant.

(2) Senator Mauzy, the friendliest witness called by appellees, whose testimony is cited by them in this very connection, and who voted against S.B.1 on other grounds (A. 302) testified that he thought, for what seem quite plausible, non-racial reasons, that it "made sense" to place these precincts in the 24th. (A. 280)

(3) There is no evidence of racial motivation in this placement. There is no hint of racism elsewhere in this Record.

(4) No hint of any racial issue appears in the Pre-trial Order summarizing plaintiff's claims.

(5) With great reluctance, appellant must now mention that the one clear racially-oriented feature of S.B.1 is its creation of a Houston District (the 18th) from which it was anticipated that a Black would be elected—as indeed occurred. (See, e.g., A. 103, 155, 188) There was nothing wrong with this action, given the demography of Harris County, but its being taken without contest quite clears the sponsors of S.B.1 of racial bias, especially in view of the last sentence in (3) just above.

On the whole, appellees' counsel summed the whole thing up just right in the one and only utterance on

this subject in either oral or written argument in the court below: "That is correct, Your Honor, this is not a race case." (A. 317)

I-A-2 and 3 (pp. 15-19)

These Points together deal with the House Plan, rejection of which is pointed to by appellees as evidence of legislative "bad faith". (That plan had 2.5% variation up and down, therein differing by 1.6% from S.B.1. This Record does not show how the two Bills compared as to *average* deviation, which is only .745% in S.B.1.)

The striking thing here is that this House Plan, with palpable variations, and itself surrounded with the very same motives that appellees stigmatize as improper in regard to S.B.1, would, if their views are right, itself be unconstitutional. Does not one enter a world of paradox, remote from common sense and practical politics, when the Legislature's rejection of one plan, itself beyond doubt invalid if appellees are right, is put forward by them as grounds for the Court's rejecting another?

As to this and to all other points made so far, mention should now be made of appellees' disclaimer of any desire to interest "this Court in the minutiae of Texas politics". (Appellees' Brief, p. 14) The truth is that just and supportable judgment, case by case, on the permissibility of small variations such as are shown in this case (either in S.B.1 or as to that bill's minuscule difference from the House bill), *must* rest on painstaking scrutiny of the minutiae of politics; Procrustean arbitariness is the alternative. The allowance of some reasonable general leeway (which appellant contends is mandated by substantive law; Appellant's Brief, Point I) is the only non-arbitrary alternative to

this unsuitable scrutiny. If the good faith of a Legislature is to be impugned for minute and fine-grained reasons, then those reasons must be minutely examined in the fine grain. (Specifically, the reasons for rejecting this House bill were multiple, and are only partly known (A. 291))

I-A-4 (p. 18)

As to the "leeways" projected by some legislators (p. 18), it should first be noted that any such beliefs running over 5% up and down were on any calculation a kind of subjective *injuria sine damno*, since the total up and down variation in S.B.1 is only 4.1%. The argument from these imaginations of or beliefs in a slight leeway (on the part of people some of whom were not lawyers and most if not all of whom were not constitutional experts) is, moreover, not relevant over the whole range of controverted ground, for if this Court agrees either with appellant's contention (Appellant's Brief, Point I) that reasonable general leeway is allowed by substantive constitutional law, or with his contention that respect for county lines justifies these small variations (*ib.*, Point II-B), then these beliefs will have been correct. In any case, such belief in small leeways in no way evidences that resolute bad faith, tending in a specific substantive direction, found as a fact in *Kirkpatrick*, as fully developed in Appellant's Brief, in its Point II-A, at pp. 66 ff.

A practically-oriented layman's opinion on a point of law, not clear even to law reviews (See Appellant's Brief, p. 68) is in no common sense of the word "bad faith" at all.

I-B-1 (pp. 19-22)

This important section is replete with misinterpre-

tations on the county-line issue; indeed, it consists entirely of these.

It is true (Appellees' Brief, p. 20) that there is no "instance where the deviation *in a particular district* under S.B.1 can be attributed . . . to preservation of county lines" [Emphasis supplied.] How could there be, except in the truistic sense (which cannot be appellees' meaning) that population variance between any two contiguous districts could always be reduced by splitting any county on the border between them? But appellees themselves, in their own Plan B, have furnished a complete demonstration that the *whole set* of small variations in S.B.1 can be explained *entirely* by "preservation of county lines." (See Appellant's Brief at pp. 73 ff.)

It is not shown, nor is it other than the exact opposite of true, that "county lines were cut [in S.B.1] when it was expedient to do so". Appellant is content to accept the issues tendered by appellees' own four examples, presumably well-chosen (Appellees' Brief, p. 20):

> (1) Ector County was cut (not around but through Odessa) because, as a mere glance at a county-population map will show, any other course would have produced a District going out from El Paso about 450-500 miles, through sparsely populated counties.
>
> (2) Appellees seem to be saying here that Districts 21 and 23 "fleshed out" rural population with urban population. (p. 20) The 21st is 75.6% "urban", and about 60% "metropolitan"; the 23rd is 69.4% "urban" and about 52% "metropolitan". U.S. Bureau of the Census, *Congressional District Data, Texas*, April, 1972, p. 10. Is comment necessary?

(3) The 22d groups part of Houston, some Houston suburbs, Fort Bend County, and a part of Brazoria County. Since the latter two counties as a whole have only about 160,000 people, in part urban, it is impossible that urban population could here be "fleshing out" rural. Something, after all, had to be done about the fact that the population of Harris County is not evenly divisible by 466,530 —an arithmetical condition which no constitutional doctrine can call into being.

(4) The 6th District, likewise, ended up heavily "urban" and "metropolitan". U.S. Bureau of the Census, *Congressional District Data, Texas*, p. 8.

In all four instances, if anything is being "fleshed out", it is the urban population that is being "fleshed out" with the rural, to the submergence of the latter. (It must be added, in view of appellees' astonishing statements on the "fleshing out" of dominantly rural districts with urban population, that *every District* to form which county lines were cut or a county divided in S.B.1—viz., the 3rd, 4th, 5th, 6th, 7th, 8th, 12th, 16th, 18th, 19th, 22d, 23d and 24th—is dominantly to totally "urban" and "metropolitan", ib., pp. 8-10.)

But something like this was inevitable. Appellees correctly say, as though it were a *charge*, that, except for Ector County (already explained) "all cutting of county lines in S.B.1 involves the highly urbanized counties." Of course it does, because those counties, with far more people than it takes to make one District, or in some cases two or three Districts, and lacking the nearly miraculous accident of remainderless divisibility by 466,530, *had* to be cut. In other words (except for Ector County, cut to avoid a District of absurd geographical size), S.B.1, even by appellees own account, cut county lines only when it strictly had

to. This is true as to *every one* of the above enumerated Districts, except the two involving Ector County. This totally disposes of appellees' claim (Appellees' Brief, p. 21) that county integrity was "a factor of the lowest priority . . ." Even more significantly, the figures just given, on appellees' own examples, makes quite disturbing appellees' suggestions (Appellees' Brief, pp. 20 and 21) that the necessary line-cutting was so performed as to depotentiate the urban vote, and their flat assertion (*ib.*, p. 3) that "county lines were freely cut when necessary to flesh out a predominantly rural district with urban population."

It only remains to note that appellees have, even at this penultimate moment, brought forward nothing that could even suggest that the county-line defense here is a sham, as it clearly was, and was found to be, in *Kirkpatrick* (see Appellant's Brief, Point II-B). The lightest probing of their discussion of this subject makes the very contrary absolutely certain, as just shown.

CONCLUSION

Other points seem to need no reply. Standing by all his former contentions, appellant renews his prayer that the judgment of the court below be reversed.

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WHITE, SECRETARY OF STATE OF TEXAS *v.* WEISER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 71-1623. Argued February 26, 1973—Decided June 18, 1973

Texas enacted Senate Bill One (S. B. 1) providing for congressional redistricting. The State was divided into 24 districts, with an average deviation from the ideal district of .745%, and a maximum deviation of 2.43% above and 1.7% below the ideal. Appellees alleged that the reapportionment violated their rights under Art. 1, § 2, and submitted Plan B, which, although cutting across more county lines, generally followed the district lines of S. B. 1. Plan B had a total maximum deviation of .159%. Shortly before the three-judge court hearing, appellees submitted, alternatively, Plan C. That scheme, with a total maximum deviation of .284%, substantially disregarded the configuration of the districts in S. B. 1, using population as the only consideration. The District Court found S. B. 1 unconstitutional and ordered the adoption of Plan C, as being more compact and contiguous than the other plans. *Held:*

1. Although the percentage deviations in S. B. 1 are smaller than those invalidated in *Kirkpatrick* v. *Preisler*, 394 U. S. 526, and *Wells* v. *Rockefeller*, 394 U. S. 542, they were not "unavoidable" and the districts were not as mathematically equal as reasonably possible. The argument that variances are justified if they necessarily result from the State's attempt to avoid fragmenting political subdivisions by drawing district lines along existing political subdivision lines is not legally acceptable. *Kirkpatrick*, *supra*, at 533–534. Pp. 6–7.

2. Though the drawing of district boundaries in a way that minimizes the number of contests between present incumbents does not of itself establish invidiousness, *Burns* v. *Richardson*, 384 U. S. 73, 89 n. 16, it is not necessary to decide whether such state

Syllabus

interest will justify the deviations in S. B. 1, since Plan B serves this purpose as well with less population variance. Pp. 8–9.

3. Population variances do invidiously devalue the individual's vote at some point or level in size, and this is especially noticeable in congressional districts with their substantial populations. Pp. 9–10.

4. Plan B, to a greater extent than Plan C, while eliminating population variances, adhered to the districting preferences of the state legislature, which has "primary jurisdiction" over legislative reapportionment. Pp. 10–14.

Affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in Part I of which all Members joined and in Part II of which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined. MARSHALL, J., filed an opinion concurring in part in Part II.

NOTICE · This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–1623

Mark White, Jr., Etc., Appellant, *v.* Dan Weiser et al.	On Appeal from the United States District Court for the Northern District of Texas.

[June 18, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the congressional reapportionment of the State of Texas.

On June 17, 1971, the Governor of the State of Texas signed into law Senate Bill One (S. B. 1). Tex. Acts, 62d Leg., 1st C. S., c. 12, p. 38, providing for the congressional redistricting of the State. S. B. 1 divided the State into 24 congressional districts for the ensuing decennium.[1] Based upon 1970 census figures, absolute population equality among the 24 districts would mean a population of 466,530 in each district. The districts created by S. B. 1 varied from a high of 477,856 in the 13th District to a low of 458,581 in the 15th District. The 13th District exceeded the ideal district by 2.43% and the 15th District was smaller by 1.7%. The population difference between the two districts was 19,275 persons, and their total percentage deviation was 4.1%. The ratio of the 13th District to the 15th was 1.04 to 1.

[1] Prior to the passage of S. B. 1, the Texas Senate had twice defeated redistricting bills, passed by the House, with total deviations smaller than the total deviation in S. B. 1.